

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
DONALD E. BEVAN,)

Appellant,)

vs.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Respondent.)

PCHB No. 48

FINDINGS OF FACT,

CONCLUSIONS AND ORDER

This appeal came on for a hearing on the 13th day of January, 1972 before all members of the Board on the sole issue of whether construction of a nature to cause a diversion or an impedance of the flow was necessary to an appropriation of water under the laws of the state. The appellant, Dr. Donald E. Bevan, was personally present, and he was represented by his attorney Charles E. Corker; the Department of Ecology was represented by Glen H. Fiedler, a supervisor, and by its attorney, Robert V. Jensen, assistant attorney general.

The appellant, Dr. Donald E. Bevan, testified as did Mr. Glen

H. Fiedler, Mr. Murray G. Walker and Mr. Ralph Anderson for the respondent, Department of Ecology. All exhibits offered were admitted.

Counsel for both parties had previously submitted written briefs, and also presented oral arguments.

Based on the evidence and the arguments submitted, the Pollution Control Hearings Board made Proposed Findings of Fact, Conclusion and an Order together with an Addendum. These were submitted to Dr. Bevan, the Department of Ecology and their respective counsel on February 1, 1972. The Respondent's Exceptions were received on March 3, 1972 and the Appellant's Reply thereto on April 10, 1972.

Since that date, the Pollution Control Hearings Board has again studied the record in the light of the exceptions taken and the reply thereto, and adheres in substance to the proposed decision; however, certain changes and additions have been made in the Findings of Fact and Conclusions, and the Board now presents the following as its Findings of Fact, Conclusions and Order.

FINDINGS OF FACT

I.

Dr. Donald E. Bevan, a member of the faculty of the College of Fisheries at the University of Washington on April 17, 1969 filed an application for 5.0 cubic feet per second (June 1 through October 31) from the surface water of Cherry Creek, a tributary of the Snoqualmie River in King County, within the E½ of the NW¼, Section 17, Township 26 North, Range 7 E.W. M. (Surface Water Application #21550).

II.

Dr. Bevan desired this appropriation for fish propagation research

which could lead to improved migration, rearing and spawning of salmon and trout. Dr. Bevan is recognized as an expert in that field, and the potential value of his research was not questioned. The flow of Cherry Creek through Dr. Bevan's property, where he intends to conduct his research would not be diminished in quantity or quality by his research and experimentation.

III.

Dr. Bevan owns the land on both sides of Cherry Creek in the area in which his proposed research will be conducted. To facilitate the research, he has riprapped the channel on both banks, where Cherry Creek flows through his property. The expense for one side was \$2,232.13, of which \$1,663.50 was reimbursed by the Department of Agriculture (Agricultural Stabilization and Conservation Service). The riprapping on the other side was done at an earlier date, and Dr. Bevan's records of cost are not available, but he believes it to have been more expensive. These expenditures were all made prior to the present application.

IV.

The Department of Ecology concedes that the appellant's research in fish propagation is a beneficial use, but assuming that the desired amount of water is available, it insists that some construction either by way of a diversion or an impedance of the flow is essential to an appropriation of water under RCW Chapter 90.03.

V.

Practically all appropriations from streams do deal with a diversion from the stream, or an impeding of the flow in the channel of the stream, neither of which is necessary in the present instance, and would in fact

be inadvisable. There would be no injury to the public or its rights in the water resulting from the research conducted by Dr. Bevan and no consumptive use of the water.

From the foregoing Findings of Fact, the Pollution Control Hearings Board reaches the following

CONCLUSIONS

I.

No issue of fact is presented; the sole issue is whether there must be some construction in the nature of a diversion of or an impedance in the waters of a stream, before there can be an appropriation of a certain amount of the waters of that stream.

II.

Neither the statutes nor the public policy of this state require an appropriator to either divert appropriated water from a stream, or to in some way impede its flow, when neither is necessary to accomplish the beneficial purpose for which the water is required.

III.

Historic usage requiring a diversion or some impedance of the flow a prerequisite to an appropriation for a beneficial use cannot be relied upon when the circumstances that made the usage relevant are not presently applicable. "New occasions teach new duties; Time makes ancient good uncouth."--(Lowell)

IV.

Based upon the Findings of Fact and particularly Finding V, we must conclude that no diversion or impedance of the waters of Cherry Creek shall be required as a condition of the appropriation requested by Dr. Bevan.

ORDER

Based on the foregoing Findings of Fact and Conclusions, the Pollution Control Hearings Board enters this order, reversing the decision of the Department of Ecology denying Surface Water Application #21550 of Donald E. Bevan because the application did not require some construction in the nature of a diversion or an impedance in the waters of the stream; that being in the judgment of the Board an insufficient and improper basis for denying the application; the Pollution Control Hearings Board further directs the Department of Ecology to further consider the application and act thereon.

DONE at Olympia, Washington this 1th day of June, 1972.

POLLUTION CONTROL HEARINGS BOARD

Matthew W. Hill
MATTHEW W. HILL, Chairman

James T. Sheehy
JAMES T. SHEEHY, Member

Walt Woodward
WALT WOODWARD, Member

ADDENDUM

This case may be sui generis by reason of the unusual nature of the use for which the water is required. We decide only the issue squarely presented to us; i.e., an appropriation of water for a beneficial use cannot be denied because no diversion or impedance is required.

Nor do we regard this application as in any sense the establishment of a minimum flow by private action from June 1 to October 31 of each year. The State is entitled to take such action as it may desire in

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

establishing a minimum flow. Dr. Bevan's use being non-consumptive; the only limitation that we see on the Department of Ecology is to restrict any diversion from upstream sources that would reduce the amount available to Dr. Bevan during the designated period below 5.0 cubic feet per second.